142

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No. 09-188

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSEPH V. FISHER,

Petitioner,

—v.—

THE PENN TRAFFIC COMPANY, BYRON E. ALLUMBAUGH, RICHARD P. BRENNAN, KEVIN P. COLLINS, JAMES A. DEMME, MATTHEW GLASS, ROBERT HOCKETT, RICHARD D. HOLIHAN, JR., PETER L. ZURKOW, JOHN DOES NOS. 1-5, BERNADETTE RANDALL-BARBER AND JANE ROES NOS. 1-5,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. *STARE DECISIS* SHOULD NOT BAR GRANTING THE WRIT 1

II. THE FACTS OF THIS CASE DO NOT MILITATE AGAINST REVIEW BY THIS COURT 5

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Automated Packaging Systems, Inc. v. Commissioner
70 T.C. 214 (1978) 9

Brass v. American Film Technologies, Inc.
987 F.2d 142 (2d Cir. 1993) 11

Firestone Tire & Rubber Co. v. Bruch
489 U.S. 101 (1989) 3-4

Great-West Life & Annuity Assurance Company v. Knudsen
534 U.S. 204 (2002) 2

In re Braniff Airways, Inc.
27 B.R. 222 (N.D. Tex. 1982) 9, 10, 11

Kennedy v. Empire Blue Cross and Blue Shield
989 F.2d 588 (2d Cir. 1993) 6

LaRue v. DeWolff, Boberg & Assocs., Inc.
551 U.S. 1130 (2007) 3

LaRue v. DeWolff, Broberg & Assoc's., Inc.
552 U.S. 248 (2008) 2

Leegin Creative Leather Prods. v. PSKS, Inc.
551 U.S. 877 (2007) 2, 3

Local 144 Nursing Home Pension Fund v. Demisay
508 U.S. 581 (1993) 3

Massachusetts Mutual Life Insurance Company v. Russell
473 U.S. 134 (1985) 1, 2, 3

Pilot Life Ins. Co. v. Dedeaux
481 U.S. 41 (1987) 3

Strom v. Goldman, Sachs & Co.
202 F.3d 138 (2d Cir. 1999) 2

Varity Corp. v. Howe,
516 U.S. 489 (1996) 3

Statutes

ERISA § 2, 29 U.S.C. § 1001 1

ERISA § 502, 29 U.S.C. § 1132 ..... 2, 3, 4, 7

ERISA § 4041, 29 U.S.C. § 1341 7

ERISA § 4044, 29 U.S.C. § 1344 ..... 8, 9

ERISA § 4045, 29 U.S.C. § 1345 ..... 7, 10

Regulations

29 C.F.R. § 2560.503-1 6

29 C.F.R. § 4044.4 ..... 7, 9

Other Authorities

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 295 (1974) 4

H.R. Rep. No. 93-533 (10/2/73), 2 Legislative History of the Employee Retirement Income Security Act of 1974, p.2348 (G.P.O. 1976) 1

Sec'y of Labor Amicus Br. in Support of Petitioner, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 06-856, at 28 4

Sec'y of Labor Amicus Br., *Callery v. United States Life Ins. Co. in the City of New York* 392 F.3d 401 (10th Cir. 2004) 4

Sec'y of Labor Amicus Br., *Coan v. Kaufman* 457 F.3d 250 (2d Cir. 2006) 4

Sec'y of Labor Amicus Br., *Goeres v. Charles Schwab & Co.*, 220 Fed. Appx. 663; 2007 U.S. App. LEXIS 3519 (9th Cir. 2007) 4

Sec'y of Labor Amicus Br., *Green v. Exxonmobile Corp.* 470 F.3d 415 (1st Cir. 2006) 4

Sec'y of Labor Amicus Br., *Pereira v. Farace* 413 F.3d 330 (2d Cir. 2005) 4

REPLY BRIEF FOR PETITIONER

This case presents the Court with an opportunity to correct a grave injustice - the denial of any meaningful remedy to participants of employee benefit plans who have lost a benefit due to a breach of fiduciary duty. Respondents' suggest that Congress intended that fiduciaries not be liable for injuries that harm only individual participants but not the plan. Resp. Bf. at 16. However, in ERISA's statement of policy, Congress made it clear that the purpose of ERISA was "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b) ERISA § 2, . Indeed, "[t]he primary purpose of the bill (that became ERISA) is the protection of individual pension rights ...." H.R. Rep. No. 93-533 (10/2/73), 2 Legislative History of the Employee Retirement Income Security Act of 1974, p.2348 (G.P.O. 1976) Assuming that Congress intended that participants who lose benefits because of a fiduciary breach should be left without a remedy would undermine the principal basis for the passage of ERISA.

I. *STARE DECISIS* SHOULD NOT BAR GRANTING THE WRIT

While this Court decided *Massachusetts Mutual Life Insurance Company v. Russell*· 473 U.S. 134 (1985)[1], in 1985, the lower federal courts,

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[1] To the extent Respondents' brief asserts *Russell* was decided correctly, Petitioner has addressed that issue in his Petition and

consistent with Justice Brennan's concurring decision in *Russell*, continued to grant make-whole monetary relief to participants pursuant to § 502(a)(3) until the decision in *Great-West Life & Annuity Assurance Company v. Knudsen*, 534 U.S. 204 (2002) in 2002.[2] See e.g. *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999). Thus, a decision by this Court, at this time, confirming that remedy would have little of the unsettling effect that *stare decisis* is meant to prevent.

Nor should *stare decisis* bar revisiting *Russell* even though it was a statutory interpretation case.[3] In *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007), this Court overruled a 96 year old precedent concerning the Sherman Anti-trust Act. The Court noted that

> *[s]tare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right. And concerns about maintaining settled law are strong when the question is one of statutory interpretation.

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will, of course, respond in more detail if this Court grants the writ.

[2] Respondents assert that *Russell* was confirmed by this Court's decision in *LaRue v. DeWolff, Broberg & Assoc's., Inc.*, 552 U.S. 248 (2008). Resp. Bf. at 9-14. However, the validity of the Court's interpretation of § 409(a) in *Russell* was not at issue in *LaRue*. The question was whether LaRue's claims were cognizable under *Russell* and the Court therefore did not need to revisit the basis of its decision in *Russell*.

[3] Of course if the Court were to rule in Petitioner's favor on the § 502(a)(3) issue, it would not need to revisit *Russell*.

Id. at 899 (internal quotation marks and citations omitted). However, the Court was not constrained by *stare decisis* because the Sherman Act is a common-law statute and the federal courts act more as common-law courts when applying the Sherman Act. *Id.* The same may be said of ERISA because Congress "expected" courts would develop "a federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). Congress surely did not expect that the federal courts would develop a common-law which excluded a make-whole remedy for fiduciary breaches.[4]

Moreover, in that this Court granted certiorari on the § 502(a)(3) issue in *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 551 U.S. 1130 (2007), only a few years after *Great-West*, both the lower courts and employee benefit plans are well aware that this issue remains unresolved. Thus, *stare decisis* is inapplicable to the § 502(a)(3) issue. This is further buttressed by the position of the United States with respect to this issue.

> ERISA was enacted against the backdrop of the law of trusts, and Congress specifically intended that the law of trusts would inform interpretation of the Act, including its remedial provisions. *Varity Corp.* [*v. Howe*, 516 U.S. 489] at 502; *Firestone Tire*

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[4] If Petitioner is correct that the language in *Russell* concerning relief to the plan as a whole was *dicta*, Petition at 18-19, *stare decisis* would not even be a consideration. See *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581 (1993).

> *& Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989); H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 295 (1974). It therefore is especially appropriate for relief to be available against a breaching fiduciary under Section 502(a)(3) if it would have been available against a trustee in a court of equity.[5]

Sec'y of Labor Amicus Br. in Support of Petitioner, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 06-856, at 28. Indeed, the United States Department of Labor had, prior to *LaRue*, advocated this position consistently in many cases throughout the country, e.g. Sec'y of Labor Amicus Br., *Green v. Exxonmobile Corp.*, 470 F.3d 415 (1st Cir. 2006); Sec'y of Labor Amicus Br., Sec'y of Labor Amicus Br., *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006); Sec'y of Labor Amicus Br., *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005); Sec'y of Labor Amicus Br., *Goeres v. Charles Schwab & Co.*, 220 Fed. Appx. 663; 2007 U.S. App. LEXIS 3519 (9th Cir. 2007); Sec'y of Labor Amicus Br., *Callery v. United States Life Ins. Co. in the City of New York*, 392 F.3d 401 (10th Cir. 2004); and continues to do so, e.g. U.S. Solicitor General and Sec'y of Labor Amicus Br. in support of petition for certiorari, *Amschwand v. Spherion*, 07-841 (2008).

Nor is the fact that Congress has not addressed this issue dispositive. First, as set forth above, the § 502(a)(3) issue has not been resolved by

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[5] To the extent Respondents' brief asserts the § 502(a)(3) issue has been resolved, , Petitioner has addressed that issue in his Petition and will, of course, respond in more detail if this Court grants the writ.

this Court. Second, one could not have expected the Bush Administration or the Republican controlled Congress, neither known for pro-labor positions, to have passed ameliorating legislation to remedy this problem. While the current Administration and Congress may eventually address this issue, they are beset by two wars and an economy on the verge of collapse, and will probably not do so in the foreseeable future. Too many more participants and their beneficiaries will lose promised benefits in the interim. This Court must act.

II. THE FACTS OF THIS CASE DO NOT MILITATE AGAINST REVIEW BY THIS COURT

This case presents almost a perfect factual scenario for resolution of the issues advanced. Quite simply, Petitioner did everything that was required of him to receive his lump sum benefit, i.e. he applied for it and he met the requirements for receiving it. Respondents, on the other hand, failed to pay the benefit despite being required to do so. The lower courts having dismissed Petitioner's complaint for failure to state a claim upon which relief may be granted, Respondents' attempt to inject the Court into the merits of Petitioner's claims, Resp. Bf. at 25-28, should be rejected. Nonetheless, in an excess of caution, Petitioner addresses these arguments.

1. The Complaint (20a[6]-28a), whose allegations must be assumed true, alleges:

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[6] All such references are to the Appendix which follows the Conclusion to the Petition.

2. Plaintiff applied for a lump sum benefit on August 15, 2003. (23a at ¶ 9)

3. Typically, the Plan paid lump sums within two weeks of application. (24a at ¶ 19)

4. On September 29, 2003, the Board passed a resolution to terminate the Plan. (25a at ¶ 22)

5. By letter dated October 17, 2003, Petitioner was informed that he would not receive a lump sum benefit (23a at ¶ 11) but the Plan continued to pay other retirees lump sums (25a at ¶ 23)

6. By letters dated November 3 and 17, 2003, Petitioner timely appealed the denial of the lump sum (24a at § 15)[7]

7. Petitioner never received a response to his appeal (which was due in January 2004- see 29 C.F.R. § 2560.503-1(i)[8])

The Plan was terminated on January 21, 2004 pursuant to ERISA § 4041(a)(2), 29 U.S.C. § 1341(a)(2) ERISA § 4041, (http://www.pbgc.gov/workers-retirees/find- your-pension-plan/PlanPage/plan_20018500.html).

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[7] Petitioner was required to exhaust the Plan's claims procedures before he could file suit. *Kennedy v. Empire Blue Cross and Blue Shield*, 989 F.2d 588, 594-96 (2d Cir. 1993).

[8] Claimant to be notified of decision on appeal within 60 days of plan's receipt of request for review.

ERISA § 4041(c)(3)(D)((i)(I) and (ii)(II), 29 U.S.C. § 1341(c)(3)(D) ERISA § 4041, ((i)(I) and (ii)(II), provide that after a notice of termination is sent, a plan may no longer pay benefits in the form of a lump sum. Accordingly, ERISA did not preclude payment of a lump sum benefit to Plaintiff prior to that date.[9] However, because Petitioner could not commence litigation until he had exhausted the Plan's claims procedures (see note 7 *supra*) which did not occur until early to mid January 2004 (see note 8 *supra*), he effectively was foreclosed from commencing litigation for benefits under the terms of the Plan (ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)) as Respondents assert he should have. Resp. Bf. at 25-26.

Respondents other argument is predicated on 29 C.F.R. § 4044.4(b) which, Respondents assert, Resp. Bf. at 2 n.2, precludes the payment of a lump sum prior to issuance of a notice of termination, *i.e.* from the time "it is anticipated that, because of insufficient assets to cover its obligations, an ERISA plan will have to undergo a distress termination." Respondents are mistaken.

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[9] The fact that the PBGC can recoup lump sum payments made within three years of termination, ERISA § 4045, 29 U.S.C. § 1345, is of no moment. First, it is for the PBGC to decide if a lump sum should be repaid. It is not for the Plan to decide that a lump sum, otherwise payable, should not be paid because the PBGC might decide to try to recoup it. Second, the PBGC has discretion not to recoup. ERISA § 4045 (c)(3), 29 U.S.C. § 1345(c)(3).

ERISA § 4044, 29 U.S.C. § 1344, deals with the allocation of assets by the PBGC after a plan has been terminated. Regulation 29 C.F.R. § 4044.4 states:

> b) Distributions in anticipation of termination. A distribution, transfer, or allocation of assets to a participant or to an insurance company for the benefit of a participant, made in anticipation of plan termination, is considered to be an allocation of plan assets upon termination, and is covered by paragraph (a) of this section. In determining whether a distribution, transfer, or allocation of assets has been made in anticipation of plan termination PBGC will consider all of the facts and circumstances including --
>
> (1) Any change in funding or operation procedures;
>
> (2) Past practice with regard to employee requests for forms of distribution;
>
> (3) Whether the distribution is consistent with plan provisions; and
>
> (4) Whether an annuity contract that provides for a cutback based on the guarantee limits in subpart B of part 4022 of this chapter could have been purchased from an insurance company.

First, Petitioner considers this regulation to be *ultra vires*. As set forth above, Congress precluded payment of lump sums once a notice of distress termination has been issued. If it had wanted to preclude such payments in other circumstances, it certainly knew how to do it. A regulatory agency cannot, by promulgation of a regulation, rewrite a statute. "Since the statute forbids a plan to impose a greater obligation on a participant, I do not see how a regulation could validly permit a plan to impose a greater obligation on a participant. *Automated Packaging Systems, Inc. v. Commissioner*, 70 T.C. 214, 224 (1978) (Chabot, *J.*, concurring).

Second, the regulation is inapplicable pursuant to its own criteria: there had been no change in funding or operation procedures; past practice required that Petitioner be paid a lump sum; a lump sum distribution was consistent with plan practices; and no annuity contract was implicated because payment would have been in the form of a lump sum.

Last, Respondents quote *In re Braniff Airways, Inc.*, 27 B.R. 222 (N.D. Tex. 1982) for the proposition that "[t]he purpose of [29 C.F.R. § 4044.4(b)[10]] . . . is to maintain the respective positions of the participants in a plan's assets and prevent a run on the bank."[11] The court, noted both ERISA § 4044's allocation of assets scheme on termination and the

[10] Then in effect.

[11] In the 25 years since this decision, it has never been cited for this proposition for which the court offered no citation.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests that the Petition be granted and that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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